Supreme Court, U.S.
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No. 96-1245

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., as Trustee of the Chapter 7 Estate of Southeast Banking Corporation,
Petitioner,
v.
FIRST UNION CORPORATION, a North Carolina corporation and FIRST UNION NATIONAL BANK OF FLORIDA, a national banking association, and FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

1. The Eleventh Circuit's Decision is Not an Application of Florida Common Law. 1

2. The Eleventh Circuit Did Not Rule on the Face of the Complaint. 5

3. The Implications of the Eleventh Circuit's Decision. 8

TABLE OF AUTHORITIES

PAGE

CASES

Atherton v. FDIC
519 U.S. ---, 117 S. Ct. 666 (1997) 8, 10

Bosket v. Broward County Housing Authority
676 So. 2d 72 (Fla. Dist. Ct. App. 1996)..... 3, 4

Energy Reserves Group, Inc.
v. Kansas Power & Light Company
459 U.S. 400 (1983).....4

FDIC v. Irwin
916 F.2d 1051 (CA5 1990) 1

Fleming v. Lind-Waldock & Co.
922 F.2d 20 (CA1 1990) 5

McCain v. Florida Power Corporation
593 So. 2d 500 (Fla. 1992).....3

McCoy v. Harsco Corporation
616 So. 2d 1152 (Fla. Dist. Ct. App. 1993).....2

McDonald v. Florida Department of Transportation
655 So. 2d 1164 (Fla. Dist. Ct. App. 1995).....2

Napolitano v. Security First Federal Savings
and Loan Association
533 So. 2d 948 (Fla. Dist. Ct. App. 1988) 2

TABLE OF AUTHORITIES (CONTINUED)

PAGE

CASES

Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency 34 F.3d 753 (CA9 1994) 6

Zamora v. Columbia Broadcasting System 480 F. Supp. 199 (S.D. Fla. 1979) 3

OTHER AUTHORITIES

12 U.S.C. § 161 7

12 U.S.C. § 1820(c) 7

12 U.S.C. § 481 7

12 U.S.C. §§ 248(a)(1).....7

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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1. The Eleventh Circuit's Decision is Not an Application of Florida Common Law.

With some desperation, respondents FDIC and First Union strive to prove to the Court that the Eleventh Circuit did not grant First Union immunity from suit, thereby creating new federal common law. The FDIC tells the Court that the Eleventh Circuit's decision "rests on familiar state tort and contract law causation principles," Brief for the FDIC, p.11, and First Union importunes that the "narrow, fact-specific decision simply did not create any federal common law or any general rule of decision applicable beyond the four corners of Brandt's complaint," Brief for First Union, p.11. The linchpin of both arguments is the notion that the Eleventh Circuit—without citing *any* state precedent or engaging in any discussion whatsoever of Florida law—decided this case on Florida common-law principles, and thus did not inappropriately invoke its federal common-lawmaking powers. As they struggle to dress the decision in new raiment, however, respondents succeed only in further exposing its true nature.

First, there is *no* Florida-law basis for the Eleventh Circuit's ruling. The FDIC offers the strained argument that the court's citation to *FDIC v. Irwin,* 916 F.2d 1051 (CA5 1990)—the *only authority* cited in the Eleventh Circuit's decision—"makes clear that it cited the case only to support its determination that the OCC's decision to place the Banks in receivership acted as an intervening superseding cause of the ultimate harm to SBC," thus breaking the chain of causation. Brief for FDIC, p.10-11.[1]

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[1] Both the FDIC and First Union persist in mischaracterizing petitioner's claims for relief, with the

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The Eleventh Circuit did not cite *Irwin* for this dubious proposition (assuming, however implausibly, that a Fifth Circuit decision addressing the validity of the takeover of a Texas bank under federal statutory law would have been helpful in deciding a question of Florida law), and the court would have been wrong had it done so. Under Florida law, causation *is a question of fact* for resolution by the jury in both tort and breach of contract actions. *E.g., McCain v. Florida Power Corporation,* 593 So. 2d 500, 504 (Fla. 1992); *McDonald v. Florida Department of Transportation,* 655 So. 2d 1164, 1168 (Fla. Dist. Ct. App. 1995); *McCoy v. Harsco Corporation,* 616 So. 2d 1152, 1154 (Fla. Dist. Ct. App. 1993); *Napolitano v. Security First Federal Savings and Loan Association,* 533 So. 2d 948, 950 (Fla. Dist. Ct. App. 1988).

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FDIC insisting that the claim was based on "First Union's alleged discussions with the FDIC" and First Union declaring that "the basis of First Union's alleged liability" was "its disclosure of information about the financial condition of Southeast's insolvent banks." Brief for FDIC, p.11; Brief for First Union, p.10. Despite respondents' continued repetition of these inaccurate statements, they remain inaccurate. The complaint alleges tortious acts and breaches of contract that reach back *months before the government takeover* and encompass far more than the discussions between First Union and federal banking regulators, including claims for breach of contract, trade slander (for false and defamatory public statements about Southeast and its subsidiaries), fraud in the inducement, promissory estoppel, and tortious interference with business relationships that are alleged, among other state claims, to have caused harm to Southeast. (App. (App.24a-27a, 33a-50a). Indeed, the Eleventh Circuit's opinion itself acknowledges the broad sweep of the claims, categorizing the Trustee's complaint as alleging that First Union: (1) "[i]ssued 'defamatory' press releases to undermine confidence in Southeast Bank"; (2) "[u]rged lenders to call in outstanding Southeast Bank debt"; and (3) pressured the FDIC to reject other merger proposals, declare Southeast Bank insolvent, and intervene. (App.7a-8a).

This is necessarily the rule where the issue concerns a purported "superseding" or "intervening" cause. Both the FDIC and First Union assert that the Eleventh Circuit merely held, apparently as a matter of law, that the government's takeover of the failed banks was the *sole cause* of any damage to Southeast Bank, thus absolving First Union of any liability for the torts and contractual breaches that occurred prior to the takeover. Brief for FIDC, p.10-11; Brief for First Union, p.10. Under *Florida law,* which the FDIC and First Union intuit was the source of the rules of decision applied (silently, of course) by the Eleventh Circuit, however, "the question of foreseeability as it relates to proximate causation generally *must be left to the factfinder to resolve.*" *McCain v. Florida Power Corporation,* 593 So. 2d 500, 504 (Fla. 1992) (emphasis added). "Whether the *evidence* shows there was an intervening cause relates to the factual question of the defendant's proximate causation and *is to be determined by the factfinder.*" *Bosket v. Broward County Housing Authority,* 676 So. 2d 72, 74 (Fla. Dist. Ct. App. 1996) (emphasis added; citation omitted).[2]

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[2] In a somewhat murky argument, the FDIC asserts that the Eleventh Circuit "was entitled to conclude that there was no proximate causation under Florida law" for reasons "of public policy." Brief for FDIC, p.10 n.5. The *only* Florida-related authority cited by the FDIC for this singular proposition is *Zamora v. Columbia Broadcasting System,* 480 F. Supp. 199 (S.D. Fla. 1979), in which the district court dismissed an action brought by a convicted murderer against three television networks for the dissemination of violent television programs that allegedly had caused him to commit murder. *Id.* at 200-01. Not surprisingly, the district court refused to "create such a wide expansion in the law of torts in Florida." *Id.* at 201-03. In the course of its discussion, the district court remarked that "[t]he questions of duty and proximate cause are, initially at least, questions of law" and that "[i]t becomes essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences," a question that embraces "policy considerations." *Id.* at 201

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Thus, even indulging respondents' assumption that the Eleventh Circuit was applying Florida law without saying so, the court could not have decided "causation" on its own—least of all on a motion to dismiss, with neither facts nor evidence having been adduced. There is simply *no* Florida-law basis for the Eleventh Circuit's decision.

It is particularly ironic that *First Union,* as the accused perpetrator of the tortious acts and contractual breaches, even seeks to invoke the "intervening cause" doctrine—because the essence of the Trustee's claims is that First Union actively strove to secure precisely the result that it now seeks to cast as the "intervening cause." (App.33a-50a). Under Florida law, a defendant may be shielded from liability when "the intervening cause *is completely independent*" of the defendant's misconduct, was "not set in motion" thereby, and was not foreseeable by the defendant. *Bosket v. Broward County Housing Authority,* 676 So. 2d at 74 (emphasis added). Neither the FDIC nor First Union explain how tort law logically can allow a tortfeasor to seek to bring about a particular result and then, upon achieving its triumph and causing the desired damage to the injured party, succeed in the argument that the very forces that were deliberately set into motion constitute an "intervening cause."

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(citations omitted). The FDIC mistakenly seizes upon this language, confusing the distinction between *duty* and *proximate cause as a matter of fact. McCain v. Florida Power Corporation,* 593 So. 2d at 502 (proximate cause is "concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred," while "duty" is "a minimal threshold legal requirement for opening the courthouse doors"). If, there is any difference between the rule applied in *Zamora* and that announced in *McCain,* the latter—as the pronouncement of the state's highest court—governs before this Court and the lower federal courts. *E.g., Energy Reserves Group, Inc. v. Kansas Power & Light Company,* 459 U.S. 400, 420 (1983).

In the end, the FDIC and First Union cannot succeed with arguments that depend upon the extraordinary presumption that a federal appellate court undertook to announce a state rule of decision without *any discussion of state law,* or even a whisper of its intention to construe or apply state law in the first instance. There is no legal foundation whatsoever in Florida law for what the Eleventh Circuit did in this case, and absolutely *no* reason to believe that the Eleventh Circuit's decision rests upon unmentioned (and, in actuality, non-existent) principles of Florida law.

2. The Eleventh Circuit Did Not Rule on the Face of the Complaint.

First Union (although not the FDIC) additionally essays an argument that the Eleventh Circuit "conducted a thorough and searching inquiry of Brandt's complaint and determined that Brandt did not, and could not, state a causal connection between the alleged conduct of First Union and its alleged damage." Brief for First Union, p.7-8. The text of the opinion itself defeats this attempt at recreating the decision in a new image.

The Eleventh Circuit recognized the allegations of the complaint that the injuries to Southeast *had been caused* by First Union's pre-seizure breaches of contractual obligations and tortious conduct. (App. 4a). Nonetheless, the Eleventh Circuit ruled that, because Southeast "cannot sue for the discretionary act of federal regulators in closing the bank," it could not bring an action against First Union since "only the Comptroller's final decision" caused injury to Southeast. (App. 4a-5a). It is one thing to say, as do the two cases cited by First Union, that a total failure to *allege* a causal connection between the defendant's conduct and the purported harm may be addressed on a motion to dismiss. *E.g., Fleming v. Lind-Waldock & Co.,* 922 F.2d 20, 24 (CA1 1990) (plaintiff failed to allege facts in support of bare allegation of causation). It is quite another thing to suggest that the Eleventh Circuit could rule—as a matter of *law*, outside the four corners of a complaint that indisputably alleges causation—that, upon the governmental takeover, "no prior act or acts" could have caused damage to Southeast, the precise allegations of the complaint notwithstanding. (App. 4a-5a).

In *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 34 F.3d 753 (CA9 1994), a decision briefly noted in the petition, the court rejected an argument virtually identical to that being made here, *i.e.,* that an "intervening cause" defense, based on a governmental action, may be raised on a motion to dismiss. There, a group of property owners challenged an environmental plan adopted by a regional planning agency in a civil rights action, and their complaint was dismissed upon a ruling that a federal injunction order "had supervened and inflicted the harm." 34 F.3d at 756. Ruling that "a question of causation is preeminently a question of fact, to be decided after trial," the Ninth Circuit held that it had been "premature to hold that [the defendant] inflicted no harm because of the injunction." *Ibid.*

There is thus no legitimate explanation for the Eleventh Circuit's decision to be found in federal procedural law. The face of the decision and governing precedent dictate that the court was not simply engaged in its traditional function of ruling on a dismissal on the pleadings.

Finally, based on the last sentence (App. 5a) in the decision ("[n]or can [Southeast] sue First Union for 'precipitating' the government's ultimate action by disclosing information the government was entitled to have"), First Union and the FDIC conjure an elaborate argument that the Eleventh Circuit had an "alternative basis" for affirming the district court. They assert that "no breach of the alleged duty of confidentiality could have occurred as the government was fully entitled to the allegedly confidential information" as part of the regulatory process. Brief for First Union, pp.12-13; Brief for FDIC, p.8-9.

Respondents thus appear to suggest that there is a basis in federal *substantive* law for the Eleventh Circuit's ruling. Even if they are correct, of course, their argument would not support a dismissal of Southeast's complaint which, as noted earlier, see n.1, *supra,* alleges torts and breaches of contract by First Union that extend far beyond First Union's discussions with federal banking regulators. No statute, and certainly none cited by the FDIC and First Union, supports an argument that enforcement of the

confidentiality agreement violates public policy. The relevant statutes can be invoked to require a bank to comply with a governmental request to provide information about itself.[3] They create, however, no *affirmative duty* in a distinct private entity to connive a method of obtaining access to confidential information and to thereafter approach federal regulators with that information.

No statutory provision is identified under which a party such as First Union is barred from contracting away whatever privilege it might otherwise have had to speak with federal regulators in exchange for the right to inspect privileged and confidential information, to which it would never have had access absent the confidentiality agreement. Certainly, no statute immunizes from liability one who deliberately tells malicious untruths in an effort to gain control over a rival bank, *as First Union is alleged in the complaint to have done.* (App.18a, 24a-27a).[4]

Without *any* statutory basis, the FDIC would impliedly preempt state enforcement of the confidentiality

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[3] See 12 U.S.C. § 481 (authorizing OCC to examine national banks as deemed necessary); 12 U.S.C. § 161 (requiring national banks to submit periodic reports to the OCC and authorizing the OCC to request supplemental information); 12 U.S.C. §§ 248(a)(1), 1844 (Federal Reserve may examine records of national banks); 12 U.S.C. § 1820(c) (FDIC may examine records of insured depositories and may issue subpoenas for testimony).

[4] The FDIC cannot seriously assert that *anything* one bank tells a federal regulator about another bank—regardless of the content of the statement, its veracity, the intent of the maker of the statement and the information conveyed—is absolutely privileged in a private cause of action. Under this formulation, one bank's malicious accusation to regulators that a rival bank is engaged in pervasive money-laundering would, for example, give rise to no right of action. Certainly, if the Eleventh Circuit had intended to announce such a sweeping rule, some additional discussion would appear in its decision.

agreement as a matter of *federal common law*—a rule as beyond the scope of the federal common-lawmaking power as the Eleventh Circuit's conferral of immunity upon First Union. Thus, far from establishing the "independent grounds for affirmance" urged by First Union, Brief for First Union, p. 12-13, the "alternative" holding only serves further to illustrate the extraordinary departure from the traditional limitations on federal common-lawmaking and the utter incompatibility of the decision with the stringent limitations that this Court reaffirmed in *Atherton v. FDIC,* 519 U.S. ---, 117 S. Ct. 666 (1997).

3. The Implications of the Eleventh Circuit's Decision.

In the end, both the FDIC and First Union are seeking to minimize the impact and import of a *ratio decidendi* that they neither sought with any particular vigor nor defend with noticeable zeal. As previously discussed, the FDIC asks the Court to treat the decision as an application of state tort and contract law. Brief for FDIC, p.11.[5] For its part, First Union suggests that certiorari

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[5] Continuing to cast about for another explanation, First Union and the FDIC note that the district court did not dismiss the complaint on the grounds used by the Eleventh Circuit. Brief for First Union, p.8 n.4; Brief for FDIC, p.6-7. This is correct—as is set forth in detail in the Petition at p.4-5—but the point is obscure, at best. The overriding criterion for certiorari, regardless of the particular ground asserted by the petitioner, is what the lower court actually decided; here, petitioner claims that the Eleventh Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court," S. Ct. Rule 10(c), and that the decision contravenes the principles recently reaffirmed in *Atherton v. FDIC.* While Brandt vigorously challenged the district court's ruling before the Eleventh Circuit, that court elected not to pass on, or even to discuss, that issue; the question before this Court arises from the Eleventh Circuit's *holding* in the case, the portent of which cannot be diminished by reference to the district court's ruling. When bank

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should not be granted because the Eleventh Circuit merely "settled a dispute arising between two private litigants," Brief for First Union, p.8, a depiction so misguided as to provide yet further confirmation of the need for this Court's intervention.

This case began its life as "a dispute arising between two private litigants"—in Florida state court. Had the matter been left to the state courts to resolve between Southeast and First Union, it indeed would have been a "dispute arising between two private litigants," to be resolved under traditional state-law tort and contract principles. The FDIC, however, intervened and removed the action to federal court, at which point the matter inevitably and inalterably lost its "private" character and became a dispute over the impact of government intervention on state-law causes of action.

With the advent of the Eleventh Circuit's decision, this case squarely presents important issues of the relationship between federal common law and state-law rights and obligations—issues that are hardly the stuff of ordinary disputes between private citizens. The Eleventh Circuit's decision hinges on the effect of the FDIC's intervention on state-law claims. Respondents' arguments on the scope of governmental power would be completely irrelevant if this were a *true* "dispute arising between two private litigants." Important questions concerning federal-state relations, the rights of citizens to bring state-law actions, and the lawmaking powers of the federal courts are at the core of this case.

With their attempted rationalizations stripped away, neither respondent has a doctrinally-sound rejoinder to the petition. There is neither a state law basis nor a federal

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officials, legal advisors, judges, or would-be predators look at the Eleventh Circuit's published decision in this case, they will read—and act upon—the words in the opinion, and not those of the district court's order or the *post hoc* excuses being offered by the FDIC and First Union. That is where the danger lies.

statutory basis for the Eleventh Circuit's decision; by process of elimination, the rule of decision is one of *federal common law*. Whether the Eleventh Circuit's ruling is most aptly characterized as a conferral of federal common-law "immunity," as asserted by petitioner, or as announcing a new federal common-law rule of "no causation as a matter of law" after a government takeover, as argued by respondents, the result is the same. The Eleventh Circuit has announced a rule of federal common law in the utter absence of *any* basis therefor, and in direct conflict with the prerequisites for the creation of federal common law reaffirmed by this Court in *Atherton v. FDIC*, 519 U.S. ---, 117 S. Ct. 666 (1997). It is the ramifications of such an unchecked exercise of the federal common-law power to which the petition speaks—and neither the FDIC nor First Union has offered an answer.

Respectfully submitted,

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